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Supreme Court, U.S.
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No. 91-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

Hispanic Broadcasting Systems, Inc.,
a Delaware corporation,
Petitioner,

v.

Federal Communications Commission,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Court of Appeals could properly create requirements, in addition to those specified in the statute for exhaustion of administrative remedies, which mandate premature filings and participation in administrative proceedings for the sole purpose of meeting the additional requirements.

2. Whether the Court of Appeals' requirement of preventive participation wrongfully elaborates the doctrine of exhaustion of administrative remedies.

3. Whether the Court of Appeals' requirement of preventive premature participation to preserve future rights impermissibly burdens access to, and the orderly operation of, the administrative process.

LIST OF INTERESTED PARTIES

The following parties appeared before the United States Court of Appeals for the District of Columbia Circuit in the proceedings below:

Hispanic Broadcasting Systems, Inc.
TVL Corporation
Coalition for the Preservation of Hispanic Broadcasting
Hispanic Broadcasting Limited Partnership
Susan M. Jaramillo
Federal Communications Commission
Station Representatives Association, Inc.
Seven Hills Television Co.
Fouce Amusement Enterprises, Inc.
Spanish International Communications Corp.*
Univision Holdings, Inc.*
Bahia de San Francisco Television Co.

*Subsidiary of Hallmark Cards, Inc.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The petitioner, Hispanic Broadcasting Systems, Inc., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit, entered in the above-entitled proceeding on April 23, 1991.

OPINIONS BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit *(en banc)* is reported as Coalition for the Preservation of Hispanic Broadcasting v. FCC, at 931 F.2d 74, and is reprinted as Petitioner's Appendix A. The panel decision of the Court of

Appeals for the District of Columbia Circuit is reported at 893 F.2d 1349, and is reprinted as Petitioner's Appendix B. The Commission's decision is reported as Spanish International Communications Corporation, 2 FCC Rcd. 3336 (1987), and is reprinted as Petitioner's Appendix C.

JURISDICTION

The judgment of the court of appeals was entered on April 23, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTE INVOLVED

47 U.S.C. §405(a) provides in pertinent part:

"After an order, decision, report, or action has been made or taken in any proceeding by the Commission, . . . any party thereto, or any other person aggrieved or whose interests are adversely affected thereby, may petition for reconsideration . . .

* * *

. . . The filing of a petition for reconsideration shall not be a condition precedent to judicial review of any such order, decision, report, or action, except where the party seeking such review (1) was not a party to the proceedings resulting in such order, decision, report, or action, or (2) relies on questions of fact or law upon which the Commission, or designated authority within the Commission, has been afforded no opportunity to pass. . . .

STATEMENT OF THE CASE

Petitioner seeks review of an en banc decision of the Court of Appeals for the District of Columbia Circuit which denied petitioner relief for failure to exhaust its administrative remedies. Notwithstanding petitioner's compliance with the governing section of the Communications Act, 47 U.S.C. §405, and with all known standards of exhaustion, the court below held that HBS had not done enough. The court elaborated a rule of exhaustion of administrative remedies which ousted petitioner from judicial review for failure to file its applications eight years previously at the earliest opportunity.

Television stations are licensed by the Federal Communications Commission ("FCC" or "Commission") to operate for a period of five years. The Communications Act governs the Commission's actions and provides criteria respecting the qualifications of licensees.[1] When a broadcaster applies for renewal of its license, other parties seeking the license may also file competing applications. Unless a competing applicant is found unqualified, it will be compared by the Commission against other qualified applicants to determine which applicant should be awarded the license. If no competing application is filed, an applicant for renewal may nonetheless be subjected to hearing on its qualification to remain a licensee. If found unqualified where there is no competing applicant, the license is not renewed and the channel is declared vacant and open to new applicants.

In June of 1983, the Commission designated for

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[1] Among other qualifications, section 310 of the Act prohibits the FCC from granting a license to an applicant more than 20% owned, directly or indirectly, by aliens.

hearing on qualifications, the renewal applications of seven television stations, among them five licensed to Spanish International Communications Corp. ("SICC").[2] Among the issues specified in the order was whether SICC was controlled by aliens or their representatives in violation of Section 310(b) of the Communications Act.[3]

After an extensive hearing, an administrative law judge's Initial Decision in January 1986, found a violation of Section 310(b), rendering SICC unqualified to remain a licensee, and denied SICC's renewal applications. SICC and other parties appealed the Initial Decision to the Review Board. While the appeals were before the Review Board, SICC announced a settlement agreement which proposed that the stations be sold to Hallmark Cards, Inc.[4]

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[2] Spanish International Communications Corp., 48 Fed. Reg. 28549 (June 22, 1983).

[3] 47 U.S.C. §310(b). "No broadcast . . . license shall be granted to or held by-- . . . (3) any corporation of which any officer or director is an alien or of which more than one-fifth of the capital stock is owned of record or voted by aliens or their representatives . . . or by any corporation organized under the laws of a foreign country. . . ."

[4] The Review Board is comprised of members of the Commission's staff; its decisions may be appealed to the Commission. Exceptions to the Initial Decision were filed with the Review Board on April 16, 1986. Despite its disqualification, SICC sought buyers for the company in May and, on June 23, 1986, informed the Review Board that an agreement had been reached which was supported by the Commission's Mass Media Bureau. A joint petition seeking approval of the settlement agreement and a grant of the renewal applications was filed with the Review Board by SICC, the Mass Media Bureau and related parties on August 19, 1986.

On September 26, 1986, while the appeals and the proposed sale were pending before the Review Board, HBS filed applications for the five channels held by SICC.[5] HBS said that acceptance of the applications was appropriate because each of the channels should be deemed vacant, and that the proposed sale was invalid because SICC had no licenses to transfer unless the finding of alien control was reversed.[6] The Review Board's decision approved the sale, but left in place the findings and conclusions of the Initial Decision that SICC was unqualified to remain as a licensee due to its violation of Section 310(b). Interested parties filed for Commission review of the Review Board decision.

The Commission's Decision

The Commission's decision, issued June 1987, addressed both the Review Board decision and HBS' petition to accept its applications. With respect to the former, the Commission declined to address, much less overrule or modify, the Initial Decision's findings and conclusions. The Commission also assumed as the predicate for its action the conclusion "that these licensees have violated the statute and that they are basically unqualified," but, even so, affirmed. Pet. App. C, p. 81a; 2 FCC Rcd. 3336, 3339.

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[5] At the same time, HBS filed with the Commission a Petition for Acceptance of Applications and a Petition to Deny the applications to transfer control of SICC to Hallmark.

[6] HBS further argued that the proposed sale was barred by a long-standing FCC policy precluding a sale until an applicant whose qualifications are under scrutiny is found qualified to hold the licenses. See Jefferson Radio Co. v. FCC, 340 F.2d 781 (D.C. Cir. 1964).

The Commission denied HBS' petition for acceptance, dismissed its applications as unacceptable for filing, denied the applications for review of the Review Board's decision, and, ignoring the finding of illegal alien ownership, granted SICC conditional renewal of its licenses. The Commission treated HBS' applications as applications for comparative consideration with SICC's applications for renewal and applied its cut-off rules.[7] Relegating HBS' argument to a footnote, the FCC mischaracterized it, and then rejected it.[8] Relying solely upon Section 1.65 of its Rules and without reference to any precedent, the Commission held that so long as its order were subject to appeal, the proceeding remains in active hearing status and, therefore, the channels were not yet vacant

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[7] The FCC specifies a date by which applications must be filed to compete with an application on file and after which further applications are "cut off." See 47 C.F.R. §73.3516(e). Of the five SICC applications, two were filed in 1980; two, in 1981; and one, in 1983. The last cut-off date for applications competing with the five applications was July 1, 1983. If the FCC has failed to act on a pending renewal application for the entire term of the license, the licensee is required to supplement its application with an update. At that time a "window" is opened for competing applications, just as if an application were being filed. However, as was the case with respect to SICC's applications, the supplement is not required if the renewal application is in "active hearing status" and, thus, no window is opened for competing applications.

[8] Pet. App. C, p. 69a n. 7; 2 FCC Rcd. 3336, 3342, n. 7. The Commission characterized HBS as claiming that the case was no longer in active hearing status because a settlement agreement was pending before the Commission. HBS actually said that the channels should be treated as vacant for the purposes of new applications because the channels were held by an unqualified licensee and the Commission was permitting the unqualified licensee to sell the stations.

and available for applications.[9]

Appeal to the Court of Appeals

On appeal, HBS sought reversal of the Commission's decisions authorizing the settlement, renewing the licenses and permitting the sale to Hallmark, and dismissing HBS' applications. In a consolidated brief, HBS argued that the Commission erred in granting renewal of SICC's licenses because SICC had been found in violation of Section 310(b) of the Act. In view of the undisturbed finding and conclusion of a violation of that section, HBS argued that the Commission lacked any authority to renew SICC's licenses.

The Commission defended its failure to accept HBS' applications by relying on its cut-off rules. Under those rules, HBS was tardy in filing applications to be considered comparatively with SICC's renewal applications. At the same time, the Commission said HBS' applications were premature for any potential vacancy because the decision was not final and §307(c) of the Act requires that the license continue in effect.[10] The Commission for the first time questioned appellants' standing, arguing that if the dismissal of HBS' application were upheld, HBS would lack

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[9] Rule 1.65, 47 C.F.R. §1.65, governs required updating of information provided by applicants so long as the application is "pending." While the rule considers an application to be pending until it is no longer subject to further review, the section expressly limits the definition of "pending" as applying to that section alone.

[10] 47 U.S.C. §307(c). The section states, in pertinent part: "Pending any hearing and final decision on [a renewal] application and the disposition of any petition for rehearing pursuant to section 405 of this title, the Commission shall continue such license in effect."

standing to contest the merits of the settlement.

In its response, HBS stressed the irrelevance of the cut-off rules and §307(c) to its application, citing similar circumstances in MG-TV Broadcasting Co. v. FCC, 408 F.2d 1257 (D.C. Cir. 1968), HBS said:

> HBS did not file its applications for SICC's television channels for the purpose of obtaining comparative consideration with SICC's applications for renewal of its license for those channels. Rather it did so in response to the administrative law judge's finding SICC in violation of Section 310(b) and denying its pending applications for renewal of licenses for those channels. In the wake of these findings, the channels previously licensed to SICC became available for application by HBS or other parties.

(HBS Reply at 6-7).

Further, irrespective of whether its earlier applications were properly dismissed, HBS asserted that it had standing to contest the license renewal and approval of the sale, citing MG-TV. A denial of the SICC renewal would leave the channels vacant and available for HBS' applications.

The Panel Decision

The panel's decision found that HBS had standing to challenge the FCC's approval of the settlement agreement. While it upheld the Commission's decision not to accept HBS' applications, the panel rejected the Commission's arguments that HBS would lose its standing if the Commission had properly dismissed

HBS' applications:[11]

> The Commission argues that, assuming we uphold its denial of the competing applications, none of the petitioners have standing as prospective competitors for the SICC licenses. It conceded at oral argument that if a reversal of its orders would result in vacant licenses, companies eligible to file applications for those licenses would have standing to challenge the Commission's order. See, e.g., MG-TV Broadcasting v. FCC, 408 F.2d 1257, 1264 n. 24 (D.C. Cir. 1968) (prospective applicant had standing to challenge assignment of a construction permit where denial of the application would have left the station vacant and available for other applications). The Commission argued, however, that MG-TV is limited to cases where the license could become available directly as a result of the court's order. We reject this distinction.

Pet. App. B, p.35a; 893 F.2d at 1355.[12]

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[11] The court mistakenly assumed that HBS had filed its applications to compete with SICC and that HBS did "not challenge that ruling before this court." Pet. App. B, p. 32a; 893 F.2d at 1354.

[12] No doubt because it mistakenly thought that HBS has conceded the matter, the panel did not apply MG-TV to the question of whether HBS' application should have been accepted. That case involved an application by MG-TV which was rejected as untimely because the FCC had pending a sale of an existing permit to a third party, even though construction of the station had not begun by the permit's expiration date. Section 319 of the Communications Act provides that a construction permit "shall . . . be automatically forfeited" if the station is not built within the time specified. The court held that MG-TV's application could not be rejected by the FCC because the FCC had not acted properly with respect to allowing the sale.

On the merits, the panel reversed the Commission. It declined to address HBS' contention that the FCC lacked statutory authority to grant a license to SICC in view of the undisturbed determination that SICC was in violation of Section 310(b). Instead, it found that the Commission violated its policy as upheld in Jefferson Radio Co. v. FCC, 340 F.2d 781 (D.C. Cir. 1964).[13]

Judge Williams dissented to the majority's holding that HBS had standing to challenge the Commission's approval of the settlement.[14] In the dissent, no mention was made of the exhaustion doctrine. The dissent erroneously stated that the FCC's cut-off rule would not "kick in" until the SICC applications were designated for hearing and faulted HBS for not applying at that time. Pet. App. B, p. 55a-56a; 893 F.2d at 1364-65.[15]

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[13] "HBS argues that §310(b) absolutely precluded the Commission from granting a license to SICC for any purpose after the ALJ's finding of de facto alien control. We need not resolve these questions, however, because we find that the Commission violated its policy as upheld in Jefferson Radio." Pet. App. B, p. 43a-44a; 893 F.2d at 1359. The court summarized the policy as "forbidding assignment at full value of broadcast stations by a licensee, whose qualifications are under investigation, until the Commission has determined that the licensee has not forfeited its broadcast authorization." Pet. App. B, p. 27a; 893 F.2d at 1351.

[14] The dissent also mistakenly thought that HBS did not challenge "the Commission's dismissal of its belated applications." Pet. App. B, p. 58a; 893 F.2d at 1365-66.

[15] In fact, section 73.3516(e) of the Commission's Rules [miscited by the dissent] requires that a competing application be filed a month before the end of the expiring license term. See 47 C.F.R. §73.3516(e).

The Decision *En Banc*

The court below, *en banc*, agreed to hear the Commission's Petition for Rehearing, which sought to overturn both the panel's holding that HBS had standing to challenge the Commission's approval of the settlement and its holding vacating that approval. Its decision, however, authored by the dissenting judge on the panel, disregarded these issues and, instead, sua sponte, reversed the panel without reaching the issue of standing by evolving a novel theory of the doctrine of exhaustion of administrative remedies.

The court acknowledged that HBS met the statutory exhaustion requirements of Section 405(a) of the Communications Act, 47 U.S.C. §405, but took the position that the Congressional scheme was but "*one* prerequisite to judicial review." Pet. App. A, p. 8a; 931 F.2d at 76. The court then created additional requirements for exhaustion.

The court accepted the panel's holding that HBS' applications were untimely.[16] It then held that in order to exhaust its administrative remedies, "[a]n applicant for a broadcast license must file a timely application with the FCC before he may challenge an adverse Commission order in this court." Pet. App. A, p. 9a; 931 F.2d at 77. A "timely" application, in the court's view, would have been a competing application filed within the cut-off period following an incumbent's application for renewal. The court thought that such

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[16] The opinion assumed as its premise the correctness of the panel's holding that the applications were untimely and did not examine the applicability of MG-TV, supra, to the issue of timeliness. It ignored HBS' explanation that it was not seeking comparative consideration with SICC, but had applied only after SICC had been declared unqualified. Pet. App. A, p. 6a-7a; 931 F.2d at 76.

early involvement "could have mooted the issues [alien ownership] fueling this litigation," because the competing applicant "could have won the licenses without winning that dispute and, moreover, could have failed to qualify for those licenses without losing it." Pet. App. A, p. 10a; 931 F.2d at 78.

It was not enough that HBS filed its applications soon after the ALJ ruled that the incumbents were unqualified, even though "their presentation to the Commission of the theories that they raise here, and the Commission's consideration of those theories, satisfies §405 . . . ." Pet. App. A, p. 8a, n. 2; 931 F.2d at 77, n. 2. To meet the new test, HBS would have had to file its first competing application with the FCC in 1980, and have prosecuted the application through the rigors of a comparative hearing at great expense and consumption of time, merely to ensure that it could obtain judicial review of a potential future unlawful act by the FCC.

As Chief Judge Mikva's cogent dissent noted, the new standard for exhaustion:

> . . . effectively requires parties with an interest in competing for vacant licenses to safeguard that interest by filing frivolous applications challenging incumbent license-holders.

Pet. App. A, p. 23a; 931 F.2d at 84 (Mikva, C.J., dissenting). He described the majority opinion succinctly as a "stepchild of exhaustion" which is "unsupported by precedent, undeveloped by the court, and unresponsive to the facts of this case." Concerned about the perversion of an important doctrine, Chief Judge Mikva said:

> [T]he court should adhere to its practice of asking

> whether dismissal of a case on exhaustion grounds would further "the primary purpose of the exhaustion doctrine": preventing premature interruption of the administrative process. Randolph-Sheppard Vendors of Am. v. Weinberger, 795 F.2d 90, 104 (D.C. Cir. 1986). See Atlantic Richfield Co. v. Department of Energy, 769 F.2d 771, 781 (D.C. Cir. 1984)(noting that avoidance of premature interruption is the "primary objective of the exhaustion doctrine," and stating that "[w]here . . . the goals of this requirement cannot be achieved, there obviously is no need for exhaustion"); . . .

Pet. App. A, p. 17a-18a; 931 F.2d at 81.

The dissent also recognized the statutory structure provided by Section 405 of the Communications Act, noting a long line of authority stating that the statute is a substitute for the judicially-created doctrine of exhaustion of administrative remedies. It implicitly recognized the preeminence of the statute, noting that if section 405 does not bar review, then prudential exhaustion requirements cannot bar review.

> [T]he only exhaustion requirement that Congress saw fit to impose in the Communications Act . . . [is] . . . Section 405 . . . .
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> * * *
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> The majority concedes that section 405, as construed in our cases, does not bar review of petitioners' claims. . . . Yet it fails to mention that this court has repeatedly held that section 405 "codif[ies] the judicially-created doctrine of exhaustion of administrative remedies." Washington

Ass'n for Television & Children v. FCC, 712 F.2d 677, 681 (D.C. Cir. 1983)). . . .

* * *

> If section 405 does not bar review, then the prudential exhaustion requirements that are incorporated within section 405 *cannot* provide a basis for dismissal of petitioners' claims.

Pet. App. A, p. 18a-19a; 931 F.2d at 81-82 (emphasis in originial). Chief Judge Mikva also specifically observed that "[t]he Commission addressed petitioners' arguments in the challenged decisions, making application of the exhaustion doctrine inappropriate." Pet. App. A, p. 20a; 931 F.2d at 82.

The majority's failure to address the importance of the FCC's Jefferson Radio policy to the implementation of its new exhaustion theory:

> HBLP and HBS, relying on prior statements of that policy, had no reason to anticipate Commission approval of a license transfer during the pendency of proceedings on the qualifications issue. Surprised in this way, HBLP and HBS did the only thing they could, opposing the settlement at all levels while filing applications for the disputed licenses.

Pet. App. A, p. 22a; 931 F.2d at 83. Chief Judge Mikva noted that it was inequitable to penalize a party for relying on the FCC to follow its own rules and policies by denying the party the right to challenge the FCC's failure to do so. He also pointed out that the majority's test is impossible to meet without taking on

an intolerable burden.[17]

IMPORTANCE OF THE CASE

This case has importance for several significant and related reasons stemming from the court's failure to follow the standard set forth in the Communications Act.

The practical impact of the court's abandoning the statutory scheme and embracing a theory of exhaustion which is founded upon judicial discretion is an exhaustion doctrine whose application cannot be limited to the FCC or its enabling statute. The procedural requirements established by the court thus threaten to bury the administrative process in protective actions throughout government.

The constitutional impact of the court's abandonment of the statutory scheme lies in the doctrine of separation of powers. While Congress chose to enact a specific requirement in Section 405 of the Communications Act, the court denigrates the Congressional scheme as only "*one* prerequisite" and erects additional formidable barriers not in keeping with the statute. If the legislature has made its choice of exhaustion requirements and has chosen a scheme where participation at the FCC and in judicial review is made to be widely available, then it is wrong for the court below to ignore that directive.

The court's abandonment of the statutory

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[17] "Must [those who would challenge FCC licensing decisions] seek every license up for renewal on the off chance that the incumbent licensee will be found unqualified, and that the license will be economically attractive at that hypothetical time?" Pet. App. A, p. 23a; 931 F.2d at 83.

requirement and its creation of a new theory of the exhaustion doctrine have led to an expanded requirement not in keeping with the decisions of other circuits, or even its own precedents. The court also departs from the fundamental purposes of the exhaustion doctrine, articulated repeatedly over the past half century, substituting instead a scheme which is both legally erroneous and poor public policy.

REASONS FOR GRANTING THE WRIT

I.

The Decision Below Is an Impermissible Judicial Incursion into Matters Fully Addressed by Congress

The *en banc* opinion constitutes a judicial incursion into matters addressed fully by the legislative branch. The court acknowledged that HBS has satisfied the exhaustion requirement established by Congress in the statute,[18] but proceeded to disregard the legislated standard and to substitute its own.

The specific requirements set forth in Section 405 of the Communications Act of 1934, as amended, 47 U.S.C. §405, are that a petition for reconsideration of an order directed to the Federal Communications Commission is required prior to judicial review only if the party seeking review was not a party to the proceedings resulting in such order, or if the party seeking review "relies on questions of fact or law upon which the Commission has been afforded no

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[18] "[Petitioners'] . . . presentation to the Commission of the theories that they raise here, and the Commission's consideration of those theories, satisfies section 405 . . . ." Pet. App. A, p. 8a, n. 2; 931 F.2d at 76-77, n. 2.

opportunity to pass."

Congress could have chosen statutory language which generally requires exhaustion of administrative remedies, as it has in other statutes.[19] It did not do so. Instead, Congress chose more limited language in keeping with the general thrust of citizen participation found in the Communications Act. By its action, Congress limited the scope of the exhaustion doctrine in review of Commission orders and, at the same time, made failure to meet its standard jurisdictional. Thus a court must dismiss an appeal where appellant failed to comply with section 405. Conversely, a court must not dismiss an appeal for exhaustion where appellant has complied with section 405.

This Court has held that the exhaustion requirement must be tailored to fit the peculiarities of the administrative system created by Congress. Parisi v. Davidson, 405 U.S. 34 (1972); McKart v. United States, 395 U.S. 185, 195 (1969). Thus the requirement must be viewed in light of the legislative intent in creating the scheme and, in particular, the specific requirements of the enabling statute. Weinberger v. Salfi, 422 U.S. 749, 765-66 (1975).[20]

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[19] See Washington Association for Television and Children v. FCC, 712 F.2d 677, 681-82, nn. 5 and 6 (D.C. Cir. 1983), for a discussion of the enactment of the relevant language in section 405 and of the various statutory exhaustion requirements.

[20] In determining that failure to meet statutory standards is jurisdictional, courts have repeatedly eschewed interference with the statutory scheme. Weinberger v. Salfi, supra, at 757; City of Peoria v. General Electric Cablevision Corp., 690 F.2d 116, 121 (7th Cir. 1982); Reid v. Engen, 765 F.2d 1457, 1462 (9th Cir. 1985)("Only if there is no statutory exhaustion requirement may we exercise our discretion to apply judicially-developed exhaustion rules."); Marathon Oil Co v. U.S., 807 F.2d 759 (9th Cir. 1986), *(continued...)*

The statutory language shows that Congress intended to place only a precise and narrow restriction on parties' ability to obtain judicial review of Commission orders. The court of appeals act of judicial activism, ignoring the Congressional scheme established by statute and imposing additional requirements upon parties seeking review, should not be permitted to stand.

II.

The Decision Below is Contrary to Precedent and is Inconsistent with the Purposes of the Doctrine

Even if the court were not bound by the statute, the decision below carries the discretionary exhaustion requirement far beyond existing precedent in its own circuit, not to mention other circuits, by creating a new element of exhaustion unrelated to the doctrine's purpose.[21] At no time since section 405 was amended in 1952 to include the specific exhaustion requirement has a court refused to treat on the merits a case where

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[20](...continued)
cert. denied, 480 U.S. 940 (1987); Morrison-Knudsen Co., Inc. v. CHG International, Inc., 811 F.2d 1209 (9th Cir. 1987), *cert. dismissed sub nom.*, FSLIC v. Stevenson Associates, 488 U.S. 935 (1988); Missouri v. Bowen, 813 F.2d 864, 871 (8th Cir. 1987). See also Natural Resources Defense Council v. EPA, 824 F.2d 1146, 1150 (D.C. Cir. 1987).

[21] This Court has disapproved invoking the exhaustion doctrine where, as here, the agency has developed the factual record and has had opportunity to consider the arguments before the court and where the use of the doctrine would require "a commitment of administrative resources unsupported by any administrative or judicial interest." Weinberger v. Salfi, supra, at 766.

a petition for reconsideration had been filed.[22] The court's reliance upon Red River Broadcasting Co. v. FCC, 98 F.2d 282 (D.C. Cir. 1938), is misplaced. In that case, the appellant never even attempted to participate at the administrative level. There, the court noted specifically that the appellant, after having determined that its interests were affected by the Commission's decision, elected to go directly to the Court of Appeals rather than seek reconsideration by the Commission. Id. at 285.

In the present case, soon after the Initial Decision found SICC unqualified, HBS began preparations to file for the SICC channels when they became vacant. HBS recognized that its interests were threatened only when the settlement agreement was announced and it became apparent that the Commission would ignore the Jefferson Radio doctrine and permit an unlawful transfer of control. HBS immediately petitioned the Commission that the transfer was not permitted, filed, following the precedent of MG-TV Broadcasting Co. v. FCC, 408 F.2d 1257 (D.C. Cir. 1968), applications for the channels which should have been vacated, and petitioned the commission to allow these filings. The Commission ruled on all of these issues. HBS' actions met both the test of Red River and of the later-

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[22] Spanish International Broadcasting Co. v. FCC, 385 F.2d 615 (D.C. Cir. 1967), was not an exhaustion case. In that case, the court upheld a Commission decision that SIBC had not acted diligently and which denied SIBC the relief requested. The court reviewed the Commission decision on the merits, and, in deciding that the Commission had acted reasonably, the court quoted extensively from Red River Broadcasting Co. v. FCC, 98 F.2d 282 (D.C. Cir. 1938). It did so, however, only to illustrate its view that the FCC acted properly (not to invoke the doctrine of exhaustion of administrative remedies), concluding: "We are unwilling to find abuse [by the FCC] in a failure to exercise a discretion that was never properly invoked." 385 F.2d at 628.

enacted Section 405. None the less, the court held that HBS had not exhausted its administrative remedies because its applications were "untimely."[23]

Case law concerning discretionary administrative exhaustion is wholly inconsonant with the court's new approach. The court rigidifies the doctrine, mandating dismissal for failure to take even the "earliest available" step. Pet. App. A, 9a; 931 F.2d at 77. The new scheme requires dismissal even if later corrective steps at the administrative level have provided the agency with the opportunity to evaluate and to rule on the questions presented to the court. In contrast, the traditional analysis of the doctrine has concentrated on "avoiding premature interruption of the administrative process." McKart v. U.S., 395 U.S. 185, 193 (1968). See N.Y. State Ophthalmological Soc. v. Bowen, 854 F.2d 1379, 1387 (D.C. Cir. 1988), *cert. denied*, 490 U.S. 1098 (1989); Atlantic Richfield Co v. U.S. Dept. of Energy, 769 F.2d 771, 781 (D.C. Cir. 1984); Athlone Indus., Inc. v. CPSC, 707 F.2d 1485, 1488 (D.C. Cir. 1983).

The court below ignores the basic principles behind the exhaustion doctrine and, instead, corrupts this important doctrine by injecting a mechanistic formality. HBS' participation satisfied all the purposes of the

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[23] The opinion engages in a tautological exercise to justify its result. It accepts as its premise the Commission's position that HBS' applications were "untimely" because they were not filed contemporaneously with SICC's applications. HBS argued below that under MG-TV the applications were timely notwithstanding the cut-off rules. The court denied review of the the Commission's failure to follow MG-TV because its applications were "not timely." Pet. App. A, p. 6a; 931 F.2d at 76.

exhaustion doctrine.[24] The essential elements of exhaustion are to prevent premature judicial action in pending administrative proceedings and to ensure that the administrative agency has had the opportunity to pass on the questions of law or fact upon which the party seeking review relies.[25]

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[24] This Court has rejected the mechanical application of the doctrine, stating that "[t]he ultimate decision of whether to waive exhaustion should...be guided by the policies underlying the exhaustion requirement." Bowen v. City of New York, 476 U.S. 467, 484 (1986). The policies mentioned in Bowen were preventing premature interference with agency processes, allowing the agency to correct its own errors, to compile a record, and to allow the agency to use its expertise. Id. Chief Judge Mikva's dissent observed:

> The majority's decision to deny judicial review will not prevent "premature" interference with FCC proceedings for the simple reason that the petitioners raised each argument presented to this court before the Commission, and the Commission conclusively rejected every one. . . . Applying the exhaustion doctrine to these facts stretches its underlying rationales beyond the breaking point.

Pet. App. A, p. 18a; 931 F.2d at 81.

[25] With the District of Columbia Circuit now being the sole exception, the concept and application of the doctrine to these two central purposes is consistent throughout the circuits. See Southern Ohio Coal Co. v. Donovan, 774 F.2d 693, 702 (6th Cir. 1985)(purpose is to permit an administrative agency to apply its special expertise in interpreting relevant statutes and in developing a factual record without premature judicial intervention); National Black Media Coalition v. FCC, 791 F.2d 1016, 1021-22 (2d Cir. 1986)(exhaustion not required where FCC has considered issue, even where raised by third party); Ezratty v. Puerto Rico, 648 F.2d 770, 774 (1st Cir. 1981); Liberty Alliance of the Blind v. Califano, 568 F.2d 333, 344-46 (3rd Cir. 1977); Mullins Coal Co. v. Clark, 759 F.2d 1142, 1145 (4th Cir. 1985); Rodrigues v. Donovan, 769 F.2d 1344, 1349 (9th Cir. 1985); Glover v. U.S., 286 F.2d 84 (8th Cir. 1961)(exhaustion not required where unnecessary to ensure that the agency has the opportunity to consider the arguments); Kennecott Copper Corp. v. EPA, 612 F.2d 1232 (10th Cir.

III.

The Decision Below Creates Unnecessary and Adverse Effects on the Administrative Process

The decision below poses a clear danger to an orderly administrative process. The decision is not grounded in the Communications Act, which would have bound the court to the language of Section 405 and limited the decision's applicability to one agency. Instead, the opinion relies implicitly on the general concept of the judicially created discretionary exhaustion requirement. It, therefore, has general applicability to all cases arising from all administrative decisions.

The court clearly sets forth the practical impact of the new exhaustion requirement:

> "[E]xhaustion of administrative remedies . . . means utilization of the earliest available corrective step," and where a litigant "'neglect[s] to avail itself of such an opportunity, it may thus have foreclosed itself from seeking further relief.'"

Pet. App. A, p. 9a; 931 F.2d at 77. In the context of the FCC, the court states that an applicant for a broadcast license must file a "timely application"[26] before appealing from an FCC order.

1979)(court heard claims of petitioner who had not participated at the agency level, but who advanced arguments that had been presented to the agency).

[26] The court accepted without question the Commission's definition of timeliness as filing a month prior to the date upon which the license term expires. See 47 C.F.R. 73.3516(e).

Despite the fact that HBS had no interest in competing against an incumbent licensee for any license, the new exhaustion rule would have required HBS to file a series of competing applications from 1980 to 1983, to participate actively in the renewal proceeding (or face dismissal for failure to prosecute), and to commit significant resources to a process it wanted no part of.[27]

It was only when the Initial Decision disqualified SICC that applications for the channels (soon to be vacant) became of interest to HBS. Indeed, HBS would likely have waited to file its applications until the channels were formally declared vacant, but for the sudden and unexpected unlawful approval by the Commission of the settlement and sale to Hallmark.

The new exhaustion requirement would place any litigant who relies on the agency to follow its own rules at risk. It means that HBS could not challenge the FCC's action which violated the policy upon which HBS relied unless HBS had, six years earlier, filed and prosecuted a protective application. Neither alternative result serves the public interest or the purposes of the exhaustion: either parties must endure long and expensive proceedings, burdening the administrative process with protective applications, or they must suffer the agency's ability to ignore its own statute and rules with impunity because no one may challenge its action in court.

While the majority opinion is written in the context

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[27] Challenges to incumbent licensees are rare because they nearly always are unsuccessful. Incumbents generally are favored in the renewal process and usually have greater financial resources to devote to a long legal process.

of an FCC proceeding, there is no basis for limiting its effect to that agency. Any failure by a party before any agency to take every possible step would subject that party to future dismissal of its request for judicial review, even where (as here) such failure is cured and the agency has addressed the issue.

No longer may a person wait until a clearly identified interest is affected by agency action. The person must enter every proceeding which might later affect his interest at its inception as a prophylactic measure and maintain an active participation through every level of the administrative process to ensure that he will not be denied judicial review. Such a danger is both unnecessary and unwarranted.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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